IN THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

CASE NO. 22-0042

STATE OF WEST VIRGINIA
Plaintiff Below, Respondent,

v. **Appeal from a final order of the Circuit Court of Marion County (20-F-145)**

BRIAN LYON
Defendant Below, Petitioner.

PETITIONER'S APPELLATE BRIEF

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ASSIGNMENT OF ERROR

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ERROR #3: The Petitioner's conviction should be overturned because the Prosecutor made extremely inappropriate comments to the jury during opening and closing argument, repeatedly referring to the Petitioner as a "Monster' and "Evil."

ERROR #4: There was insufficient evidence presented at trial to sustain convictions to convict on Premeditated First Degree Murder, Burglary, and First Degree Robbery of Mr. Moses.

KIND OF PROCEEDING AND THE NATURE OF THE RULING IN THE CIRCUIT COURT

This is an appeal from the Circuit Court of Marion County, Judge Patrick Wilson presiding. The Petitioner was convicted and sentenced after a jury trial upon the offense of Burglary, as charged in Count I of the Indictment, to imprisonment in a state correctional facility not less than one (1) year nor more than fifteen (15) years; upon the offense of First Degree Murder, as charged in Count II of the Indictment, to imprisonment in a state correctional facility for life without the possibility of parole; and upon Robbery in The First Degree (With a Firearm), as charged in Count III of the Indictment, to imprisonment in a state correctional facility for fifty (50) years; upon the offense of Use of a Firearm In The Commission Of A Felony, as charged in Count IV of the Indictment, to a determinate sentence of ten (10) years; upon the offense of

Robbery in the First Degree (With a Firearm), as charged in Count V of the Indictment, to imprisonment in a state correctional facility for fifty (50) years; upon the offense of Sexual Assault In the First Degree, as charged in Count VI of the Indictment, imprisonment in a state correctional facility not less than fifteen years nor more than thirty five (35) years, with a Ten Thousand Dollar ($10,000.00) fine; upon the offense of Attempted First Degree Murder (by Use of a Firearm), as charged in Count VII, of the Indictment, to imprisonment in the penitentiary for not less than three (3) years nor more than fifteen (15) years; Use of a Firearm In the Commission of a Felony, as charged in Count VIII of the Indictment to imprisonment in a state correctional facility for ten (10) years; said sentences are to run consecutively. *Appendix Record* (*AR*) at 450-453.

The Petitioner seeks relief in the form of a reversal of the order of the circuit court convicting the Petitioner of the aforementioned offenses and a reversal of his sentences for said offenses.

STATEMENT OF THE CASE

The underlying criminal proceeding to this appeal arose from events which occurred in the early morning hours of September 29, 2019. *AR* at 6-10. Law enforcement responded to a call from an eight year old girl at an address on Lanham Lane, in Fairmont.[1] *Id.* The girl stated to the operator that her mother had been shot and was lying on the bed. *Id.* When police arrived on

[1] For the sake of protecting the identity of the child in question, the Petitioner will refer to this witness as "the child" or "the girl" in this brief.

scene, they found the child unharmed, and her mother, Dawn Nicole Smith, was in critical condition from gunshot wounds to the back and head. *Id.* at 455-456. The body of the homeowner, Christopher Moses, was discovered in the garage, dead from apparent gunshot wounds. *Id.*

Ms. Smith was transported to Ruby Memorial Hospital for emergency medical treatment. *Id.* Her daughter, the eight year old who called 911, was taken into CPS custody. *Id.* Police stayed at the house and began an investigation of the crime scene. *Id.*

The upstairs shower was running, and the glass door of the shower was shattered. *Id.* There was a pool of blood on the floor. *Id.* In the garage, Mr. Moses' body was face down over a wheelbarrow, with coagulated blood pooled around it. *Id.* A shell casing was found on the floor near the body. *Id.* 456-457.

During the officers' investigation of the home, members of Mr. Moses' family began to arrive. *Id.* 456-458. The first, Mr. Moses' adult son, Christopher A. Moses, gave an interview to law enforcement about the goings on in his father's life shortly before Mr. Moses died. *Id.* 457. He stated that his father had recently been in rehabilitation for cocaine addiction, and that it was possible Mr. Moses had had a relapse. *Id.* He stated that his father had recently been romantically involved with Ms. Smith, as well as another woman living Clarksburg. *Id.* at 457-458. When asked if his father owed anyone any money, Mr. Moses' son did not have an answer, but stated that there had been "money problems" with his father's business recently. *Id.* at 458.

He further informed police of a feud his father had had with a former employee. *Id.* at 459. The employee had apparently been friends with his father, they had "partied together" and he introduced his father to cocaine. *Id.* They later had a falling out and became business competitors, fighting over clients. Christopher A. Moses also noted that his father's Dodge Ram 2500 truck and Harley Davidson were missing from property and provided the registration information to police. *Id.*

Carlina Elizabeth Stuart, who was the girlfriend of Christopher A. Moses, confirmed details and possible leads from the deceased's son's statement that Christopher Moses had been dealing with substance dependency issues, money problems, and that he had been involved in a relationship with another woman. *Id.*

A CAC interview was conducted on the child, wherein it was reported that the child stated that:

> she woke up around 4 in the morning and believed that it was because she had heard a noise. She then stated that she woke up again around 8 in the morning. She heard her mother arguing with a male that she believed to be Christopher Wilson Moses. [The girl] stated that she heard Chris say "I won't hurt you." [The girl] stated that Dawn was yelling at him at that time and this went on for a couple of minutes. [The girl] stated that when she heard the arguing stop, Dawn went to take a shower. After Dawn was in the shower for a few minutes [the girl] state [sic] that she heard gunshots. [The girl] stated that she then exited the bedroom she had been in a saw a male standing in the hallway.[The girl] stated that the man told her to hide in the basement from Chris. [The girl] then stated that she went to the basement and the male locked the door behind her. [the girl] then was able to exit the basement via a door that had a board covering it. [The girl] stated that she saw the same male again in the driveway. The male told her to go inside and find her mom. [The girl] went back into the house through the garage and saw Chris lying over a "weird barrel." [The girl]

> stated that she thought that he was dead. Addison then stated that she went to Chris's bedroom and found her mom, who told her to call 911.

Id. 459-460.

Police put out a BOLO out for the missing Dodge Ram 2500 and the Harley Davidson. *Id.* at 459.

Dawn Smith was in critical condition at the Ruby Memorial Hospital. *Id.* at 460. She was in no state to give a police interview on the date of her injuries, nor could she give consent for a rape test kit. *Id.* Detective Forsyth of the Marion County Sheriff's Office applied for and was granted a search warrant for a sexual assault examination kit, which was served on the hospital and later completed. *Id.*

Going on a tip from Mr. Moses' son, Detective Forsyth contacted Todd Caplinger, who stated that Mr. Moses' motorcycle was located at his garage. Mr. Caplinger further stated that:

> he spoke with Mr. Moses at 03:30 hours in the morning of 29 September 2019. Mr. Caplinger stated that he had drive [sic] around last night in the early morning hours to check on his shop in the Glenn Elk area of Clarksburg. As he passed a little barber shop next to the Clarksburg Exponent Telegram he saw Mr. Moses truck parked there. Mr. Caplinger stated that he then texted Moses telling him to be careful and not to drive because the police were out. He stated that he lied to Moses and told Moses that he had been stopped by the police. He stated that he did not want Mr. Moses driving because he knew Mr. Moses had been drinking. He stated that Moses then called him. He stated that he asked Mr. Moses what he was doing and why he wasn't home. He explained that Moses had a girl at his house to help him clean for an open house for the sale of the residence. He stated that he told Moses that he should have been home. Mr. Caplinger then stated that the building Moses was at was the old Remington Arms building. He stated that a guy was putting a barber shop in the building. That guy brought in a television and they were there to watch the fights (UFC pay per view). Mr. Caplinger then stated that on

> 28 September 2019 around dark was when Moses brought the motorcycle to his shop and parked it and picked up his truck. He stated that the address of his shop is 410 North 3rd Street, Clarksburg, WV 26301. Mr. Caplinger stated that he and his brother had operated a bike shop there for a while. Before getting off of the phone Mr. Caplinger explained that there was a guy whose last name he did not know that had a confrontation with Moses a couple of weeks prior over a girl. He stated that the guy's first name was Chris. Mr. Caplinger stated that the male and another unknown male approached Moses intent on "whipping his ass." Mr. Caplinger stated that Moses brandished a firearm and told them to back off and leave him alone. He stated that the male had it out for Chris. Mr. Caplinger stated that he did not know Chris's last name but that he would find it. Mr. Caplinger then stated Moses had dated a girl from Morgantown named Alex. He stated that she was obsessed with Moses. He was thinking that maybe she drove by in the morning and caught them in bed and that is how this had happened. Mr. Caplinger then stated that the guy's name is either Chris or Jeremy Wright. Mr. Caplinger also stated that Moses had spoken of having problems with Don Goins, his former GM. I then provided Mr. Caplinger with my contact number and told him to let me know if he obtained any new information.

Id. at 461.

Concurrently, the missing Dodge Ram pickup truck was located abandoned and set on fire in southwest Pennsylvania. *Id.*

Later on September 29, 2020, Detective Forsyth reported that he was able to establish a degree of communication with Dawn Smith. She was still in the hospital, unable to speak due to being intubated, but allegedly able to communicate through notes. *AR* at 433, 462. According to the report, Ms. Smith was able to write notes stating that she had been assaulted by a "black male." *Id.* Also, she had allegedly communicated via notes that her attacker stole her bank cards and forced her to give up her PIN numbers. *Id.*

Warrants were obtained for Ms. Smith's bank records, which showed that the card had been used at an ATM located at an Exon in Westover. *Id.* Investigating Officer, Sgt. Love, reported then going to the Exon and reviewing

security camera footage from around the time of the transaction. *Id.* The officer reported that "he observed a white truck similar to that as belonging to Chris Moses pull up to the fuel pumps." *Id.* at 461-462. He reported that he observed a black male, with "some facial hair" exit the truck wearing a light colored booine style hat and PUMA brand hooded sweatshirt. *Id.* He reported observing the male go into the store, use the ATM, make a purchase at the counter and exit. *Id.* at 463.

On September 30, 2019, Sgt. Love was in contact with police in Monongahela County, Pennsylvania, where the truck fire had been located. *Id.* at 462. Sgt. Love received contact from detectives with the Pennsylvania State Police that were investigating the vehicle fire. *Id.* They reported their investigation led to a hotel near the burning truck. *Id.* at 462-463. Surveillance video shows a male that they identified as Brian Lyon, II, at the hotel wearing clothing matching those of the individual seen on the gas station footage. *Id.* at 463.

Officer Dytco, of the Monongahela County, Pennsylvania Police Department, who was familiar with the Petitioner from a prior investigation, identified a still from the gas station as being Brian Lyon. *Id.*

Investigating officers then collected a photo array and traveled to Morgantown to present the array to Ms. Smith and her daughter. *Id.* at 462. The child was unable to identify the male she saw with any certainty. *Id.* When the array was presented to Dawn Smith, still unable to speak, she used a

marker to select the photo the Petitioner. *Id.* She wrote, "Saturday morning Chris's house not 100%." *Id.* at 133-136, 462.

On September 30, 2019, after meeting with the Marion County Prosecutor, Marion County Police prepared a criminal complaint charging the Petitioner with First Degree Murder. *Id.* at 129-132, 462. Mr. Lyon was arrested by Pennsylvania State Police on October 1, 2019. *Id.* at 462-463.

Shortly thereafter, attorneys Christopher Wilson and David Gutta were appointed as counsel to represent the Petitioner.[2] *Id.* at 11-12.

Police then ventured to Clarksburg to investigate where they believed Mr. Moses had been before he went home the night of his death. *Id.* at 464. The police report stated that they located the salon/barbershop (and apparent speakeasy) where the UFC watch party was alleged to have occurred. *Id.* at 464. The owner of the shop stated that her boyfriend, James Elliot Jr., had brought in a TV and "refreshments" for a watch party at the shop. *Id.* During the interview, Mr. Elliot arrived. *Id.*

According to the report, he refused to be recorded during the interview with police, and refused to be involved in the prosecution, though he did agree give information. *Id.* Mr. Elliot allegedly stated that he was currently on federal parole. *Id.* He stated that Mr. Moses was at the party, as well as Mr. Lyon. *Id.* He stated that Mr. Lyon showed up with a number of other guests but, he had not been invited beforehand. *Id.* He then stated he asked Mr. Lyon to leave

[2] Mr. Wilson and Mr. Gutta represented the Petitioner throughout his trial and sentencing. Based upon complaints about their representation, this writer was appointed to represent the Petitioner for appeal purposes.

after Mr. Lyon had stated he was on the run from the law. *Id.* Mr. Elliot was worried about Mr. Lyon's presence because Mr. Elliot was already on federal probation. *Id.* He stated that he did not see Mr. Lyon or Mr. Moses leave, but he was sure that Mr. Moses was at the shop until 4:00 a.m. on September 29, 2019. *Id.*

Importantly, Mr. Elliot did not appear at trial, and any information he gave to the police was only ever entered into evidence by inadmissible hearsay, by Lieutenant Matthew Piggot, without objection, at trial. Id. at 1077-1078. Other than Dawn Smith, the State had no other eye witnesses who were able to place Mr. Moses at the same location as the Petitioner.

Officers then reported reviewing security camera footage from four surrounding locations. *Id.* at 464. Of all the cameras, three showed footage of Mr. Moses' truck on the night in question. *Id.* Only one showed an unidentified individuals get into the vehicle and drive off in the early hours of September 29, 2019. *Id.* The others showed no footage of people coming or going from the vehicle. *Id.*

On October 3, 2019, the Dodge Ram was in the custody of West Virginia authorities. *Id.* Various items belonging to Ms. Smith and Mr. Moses were located inside. *Id.*

On October 8, 2019, Ms. Smith, now recovering from her injuries, gave an additional police interview, the content of which was further repeated later in her testimony. *Id.* at 465-467. During the interview, it became apparent that her recollection of events had been tainted by information from third parties.

Id. When trying to discuss events, such being awakened in the middle of the night at gunpoint, she stated she was "not sure of the times because of the neighbors saying it happened at a different time." *Id.* at 466. She discussed having met Mr. Moses at a music festival weeks prior to the incident, and that they became romantically involved shortly after. *Id.* at 465-466. On the evening of September 28, 2022, she alleged that she came, along with her daughter, to Mr. Moses' home to help him clean, as he was in the process of selling his home. *Id.* However, Mr. Moses was not home, as he was attending an Ultimate Fighting Championship watch party in Clarksburg. *Id.* She went about cleaning the home and put her daughter to bed. *Id.*

She went on to recount waking up late at night, and seeing someone on the couch covered by a blanket. *Id.* at 465-466. Thinking it was Mr. Moses, she woke the man up, only to find a black male whom she did not know. *Id.* She said that she asked where Chris was, and he responded that he was in the garage. *Id.* She said she went to the garage, to find Mr. Moses awake and intoxicated. *Id.* She then checked on her daughter, who was asleep in another bedroom, then went back to bed and fell asleep. *Id.*

According to the report Ms. Smith then stated that her next memory was being woken up at gunpoint by a black male. *Id.* at 466. She said the man forced her to hand over the cash from her purse, as well as her debit cards, which he forced her to recite the PIN numbers for. *Id.* She then stated that he forced her to go into the garage, where she found Mr. Moses' dead body. *Id.*

Ms. Smith said that the man made her go through Mr. Moses' pockets and retrieve his wallet. *Id.*

She said he then took her to the basement to search for a safe that never materialized. *Id.* at 466-467. Ms. Smith then described the man raping her at gunpoint in the basement, then taking her upstairs to the bathroom where he forced to take a shower. The report continued to allege that:

> At that point she stated she heard the shot and the glass shattered everywhere. She went to yell for Addie, but she could just feel the hole in her back where the blood and the air was coming through. The next thing she remembered is being on the bathroom floor laying on an inch of glass. She stated that all she remembered after that is the second gunshot. Ms. Smith stated that she had no other memories after that. She clarified that she briefly remembered EMS speaking on their radio but she did not remember the ride to the hospital.

Id. at 467.

The Petitioner was indicted on June 30, 2020. *Id.* at 1-10. Due to Covid 19 delays, his arraignment was not held until November 6, 2020. 19-22. At arraignment, an initial trial date was set for November 18, 2020. *Id.* at 20. The trial was then continued to the February 2021 term of court. Following an April 23, 2021, status conference, trail was again continued to the June 2021 term of court. *Id.* at 39-40.

At the first day of trial on September 8, 2021, jury selection was conducted. *AR* 720-795. Afterwards, the State presented opening argument, focusing on its ongoing faith-based, supernatural theme that the evidence in the case would prove beyond are reasonable doubt that evil and monsters are real. *AR* at 804-820. The defense presented a short argument comparing a trial

to a novel that had to be read all the way through before you could form an opinion on it. *AR* at 821.

Thereafter, the State opened its case-in-chief. The State first called the 911 operator who spoke with the child on the phone. *Id.* at 824.

The State then called the first officer to arrive on scene and discover the body of Mr. Moses, White Hall Police Chief Geno Guerreri. *Id.* at 832. He reported being at home just down the road from Mr. Moses' residence, hearing chatter of the 911 dispatch on the radio, and rushing to the scene. *Id.* at 832-33. He found the body of Mr. Moses and found Ms. Smith bleeding from her two gunshot wounds, in critical condition in the upstairs bedroom. *Id.* at 841-850. He further testified to traveling to Pennsylvania at a later date to inspect the burned truck that had been recovered. *Id.* at 857.

The State next called, Justin Efaw, the first EMT to respond, who detailed treating Ms. Smith for her gunshot wounds on the scene before helping to transport her to Ruby Memorial Hospital. *Id.* at 841-850.

To close out the first day of trial, the State called Special Agent Douglas Smith, who, at the time of the incident, was the first detective on scene for the Marion County Sheriff's Office. *Id.* at 860. He testified to the state of the crime scene when he arrived, as well as his efforts to secure the scene and collect evidence.

On trial day two, September 9, 2021, the State continued its case-in-chief by calling to testify forensic nurse, Meredith Linger, who cared for Ms. Smith at the hospital regarding treatment and investigation of Ms. Smith's

sexual assault. *Id.* at 914. The State's next witness was Marion County Detective William Forsyth, who entered investigation on September 29, 2022, when he went to the hospital to interview Ms. Smith and forensic medical evidence. *Id.* at 947. He further testified to conducting a photo lineup to see if Ms. Smith or her daughter could identify the Petitioner.[3]

The State next called Pennsylvania Trooper Terrance Crowley, to testify concerning the investigation and apprehension of the Petitioner in Pennsylvania. *Id.* at 981. Lillian Hope Taylor, an employee of the Westover Exon, was called to verify security footage of the Petitioner at the gas station on September 29, 2019. *Id.* at 989.

Marion County Lieutenant Detective Matthew Love was then called to testify concerning his investigation of Mr. Moses' residence after his death, which included photographing the scene. *Id.* at 991. He also identified video and photographic evidence of the Petitioner at the gas station on September 29, 2019. *Id.* at 1000.

After recess, the State called Marion County Detective William Matthew Pigott, one of the first officers to arrive on the scene. *Id.* at 1018. Finally, Marion County Deputy Daniel Lawson regarding recovering the cell phone of Christopher Moses on the side of the highway. *Id.* at 1113.

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[3] Beyond direct involvement in the case, Detective Forsyth, in particular, and other law enforcement generally testified with extensive hearsay or in detail about aspects of the case with which they had no direct involvement and for which no proper foundation was laid. The amount of these occurrence are far too numerous to recount. For example, see *Appendix Record 957-959* (detailing information from a police interview by the Petitioner's ex-girlfriend, Amber Gray). However, no objections were made by the defense to this extensive hearsay evidence put on by the State. Accordingly, these matters are not ripe to be addressed on a direct appeal.

On trial day three, September 10, 2021 , the State continued its case-in-chief by calling to testify Amanda Palmer, WVU trauma and surgical care physician concerning the injuries to Dawn Smith. *Id.* at 1130. The State then called Phillip Kent Cochran, to give expert forensic testimony concerning ballistic evidence from the scene. *Id.* at 1146. Joshua Haynes was called as a DNA expert, who testified that there was a piece of toilet tissue which tested positive for DNA for Dawn Smith and the Petitioner. *Id.* at 1232. In addition, an unknown male's DNA was recovered from the bathroom. *Id.* at 1228.

On trial day four, September 13, 2021, the State called medical examiner Matthew Smith. *Id.* at 1267. The State's next witness was Christopher Michael Wyckoff, the owner of the Avalon Motor Hotel in Pennsylvania who testified about the Petitioner and his ex-girlfriend staying at the hotel. *Id.* at 1275. Pennsylvania State Trooper Rocco Gagliardif was next called by the State to testify regarding to the burning Dodge Ram pickup truck that had belonged to Mr. Moses. *Id.* at 1297. Next to testify was Eric Scott Kempf, whose trail cam captured the burning Dodge Ram. *Id.* at 1319. Monongahela, Pennsylvania Officer John Dytko testified to his part in identifying and apprehending the Petitioner. *Id.* at 1341. The State then called Amber Lafawn Gray, the Petitioner's ex-girlfriend, to testify to her relationship with the Petitioner following September 29, 2019. *Id.* at 1348. The State also called Monongalia County Sergeant Craig Michael Ruscello to testify regarding his investigation concerning Dawn Smith at Ruby Memorial Hospital. *Id.* at 1363. Granville Police Chief Joseph Craig Corkrean was called to testify as an expert

concerning the location tracking of the Petitioner's cell phone, as well as the phone that had belonged to Mr. Moses. *Id.* at 1373.

On trial day five, September 15, 2021, the State continued its case-in-chief by calling to testify Metin Savasman, M.D., as an expert forensic pathologist *Id.* at 1403. Christopher Anthony Moses was called to testify, where he spoke about his father's ongoing battle with addiction and business woes, recent personal feuds, as well as completely superfluous testimony about his father's warm heart and friendly disposition. *Id.* at 1424, 1429, 1456.

Finally, Dawn Nicole Smith took the stand, and recounted her traumatic events the night of Mr. Moses' death. *Id.* at 1461. She admitted to abusing cocaine with Mr. Moses in the days before his death. *Id.* at 1472-1473. She also admitted to taking the sedative Trazadone the night in question before going to bed. *Id.* at 1473.[4]

This closed out the State's case-in-chief.

After the State put on a five day case against the Petitioner, the Petitioner's trial defense team opted to put on no case-in-chief at all. Id. at 1515-1516.

The trial court then gave the jury charge, which correlated with the written instruction. *Id.* at 1516-1547. The State then presented a closing argument, bridging the theme from its opening, in which it repeatedly described the Petitioner as "evil" and a "monster," contrasting his deeds with

[4] During the portion of direct examination where Ms. Smith talked about her interaction with the Petitioner, the prosecution asked constant, blatantly leading questions, which did nearly all of the testimonial work for the witness. There was no objection from the defense throughout, so the State was permitted to present testimony through its star witness with little more than yes and no acknowledgments to the prosecutor's statements. *Id.* at 1476-1486.

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the proof "miracles" on Earth embodied by Dawn Smith's survival.[5] The defense responded by pointing out Mr. Moses' prolonged drug history and feuds with other members of the community over business, relationships, drugs, or money. *Id.* at 1563-1585. The State then nailed home its spiritual argument in a rebuttal asking for the jurors to "close the book on the monster that is Brian Lyon. We can put the book away for all eternity where it belongs so that nobody else has to read one chapter[,]" and as a result they "can leave the doors of this courtroom today with your head held high and proud of what you did and proud of your decision and glad for what you have done to bring goodness and light in this world to close the book on evil." *Id.* at 1585-1592, 1589-1590.

Of note, in addition to failing to put on any defense, the Petitioner's trial counsel barely lodged any objections throughout the entire trial. However, the Petitioner is aware these issues are not ripe to be addressed during the instant proceedings.[6]

The jury was permitted to go home for the evening and come back for deliberations the next morning. *Id.* at 1599-1600. The next morning, day six of the trial, the jury came back with a verdict of guilty on all eight counts. The verdict for First Degree Murder was rendered without mercy. *Id.* 1602-1611.

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[5] The Petitioner will detail the legal issues presented from this argument line in Error Number 3.
[6] "The very nature of an ineffective assistance of counsel claim demonstrates the inappropriateness of review on direct appeal. To the extent that a defendant relies on strategic and judgment calls of his or her trial counsel to prove an ineffective assistance claim, the defendant is at a decided disadvantage. Lacking an adequate record, an appellate court simply is unable to determine the egregiousness of many of the claimed deficiencies." *State v. Miller*, 194 W. Va. 3, 15, 459 S.E.2d 114, 126 (1995)

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Because this case involves assignments of error in the application of settled law, unsustainable exercise of discretion where the law governing that discretion is settled, error claiming insufficient evidence or a result against the weight of the evidence, and error involving a narrow issue of law, oral argument under the Revised Rules of Appellate Procedure Rule 19 may be necessary, unless the Court determines the facts and legal arguments are adequately presented in the briefs and record on appeal. If the Court determines that oral argument is necessary, this case is appropriate for a Rule 19 argument.

Because certain issues in this case have not been authoritatively decided in the Court's jurisprudence, oral argument under the Revised Rules of Appellate Procedure Rule 20 may be necessary, unless the Court determines the facts and legal arguments are adequately presented in the briefs and record on appeal. If the Court determines that oral argument is necessary, this case is appropriate for a Rule 20 argument.

SUMMARY OF ARGUMENT

The circuit court committed reversible error by delivering two fatally defective jury instructions. The circuit court committed reversible error by delivering an instruction to the jury for Sexual Assault in the First Degree, which failed to require the jury to find that the defendant committed the act without the consent of the victim, which is an essential element of the crime. The circuit court further delivered a fatally defective jury instruction for First

Degree Murder, the State was permitted to present evidence and a theory of the case based on Felony Murder, but only allowed the jury to make a determination of premeditated First Degree Murder.

The circuit court further committed reversible error when it permitted the State to present a theory and overarching theme of the case, which relied on impermissible religious and prejudicial commentary about the character of the Petitioner.

STANDARD OF REVIEW

"The Supreme Court of Appeals reviews sentencing orders, including orders of restitution made in connection with a defendant's sentencing under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands." Syl. Pt. 1, *State v.* Lucas, 201 W.Va. 271, 496 S.E.2d 221 (1997); Syl. Pt. 4, *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (1982); Syl. Pt. 6, *State v. Slater*, 222 W. Va. 499, 501, 665 S.E.2d 674, 676 (2008).

On the issue of plain error, which was not timely raised before the circuit court, this Honorable Court holds that:

> [t]o trigger application of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.

Syllabus Point 7, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995); Syl. Pt. 2, *State ex rel. Morgan v. Trent*, 195 W. Va. 257, 465 S.E.2d 257 (1995). Further, this Court has determined that:

> Under the 'plain error' doctrine, 'waiver' of error must be distinguished from 'forfeiture' of a right. A deviation from a rule of law is error unless there is a waiver. When there has been a knowing and intentional relinquishment or abandonment of a known right, there is no error and the inquiry as to the effect of a deviation from the rule of law need not be determined. By contrast, mere forfeiture of a right—the failure to make timely assertion of the right—does not extinguish the error. In such a circumstance, it is necessary to continue the inquiry and to determine whether the error is 'plain.' To be 'plain,' the error must be 'clear' or 'obvious.'

Syllabus Point 8, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995). Syl. Pt. 3, *State ex rel. Morgan v. Trent*, 195 W. Va. 257, 259, 465 S.E.2d 257, 259 (1995).

Finally, this Court has stated that:

> [a]ssuming that an error is 'plain,' the inquiry must proceed to its last step and a determination made as to whether it affects the substantial rights of the defendant. To affect substantial rights means the error was prejudicial. It must have affected the outcome of the proceedings in the circuit court, and the defendant rather than the prosecutor bears the burden of persuasion with respect to prejudice.

Syllabus Point 9, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995); Syl. Pt. 4, *State ex rel. Morgan v. Trent*, 195 W. Va. 257, 259, 465 S.E.2d 257, 259 (1995).

On the matter of abuse of discretion, this Court has held:

> In reviewing challenges to the findings and conclusions of the circuit court in a habeas corpus action, we apply a three-prong[ed] standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard; the underlying factual findings under a clearly erroneous standard; and questions of law are subject to a de novo review.

discretion standard; the underlying factual findings under a clearly erroneous standard; and questions of law are subject to a de novo review.

Syl. Pt. 1, *Mathena v. Haines*, 219 W. Va. 417, 633 S.E.2d 771 (2006).

ASSIGNMENT OF ERROR

ERROR #1: The circuit court committed reversible error by delivering an instruction to the jury for Sexual Assault in the First Degree, which was fatally defective for failing to state an essential element of the crime.

I. Issue.

The Petitioner was convicted at trial of First Degree Sexual Assault, pursuant to W. Va. Code, § 61-8B-3(a)(i),(ii). The jury charge for First Degree Sexual Assault at trial listed the elements which must be found by the jury, beyond a reasonable doubt, as follows:

1. THE DEFENDANT, BRIAN E. LYON, II,
2. BEING FOURTEEN YEARS OLD OR MORE,
3. BETWEEN, ON OR ABOUT THE 29TH DAY OF SEPTEMBER, 2019,
4. IN MARION COUNTY, WEST VIRGINIA,
5. DID ENGAGE IN SEXUAL INTERCOURSE OR SEXUAL INTRUSION,
6. WITH DAWN NICOLE SMITH,
7. AND INFLICTED SERIOUS BODILY INJURY TO DAWN NICOLE SMITH,
8. AND/OR EMPLOYED A FIREARM IN THE COMMISSION OF THE ACT.

AR at 351.

There was no objection to this instruction. *AR* at 1511-1512. However, W. Va. Code, § 61-8B-2, "Lack of Consent," states that, "[w]hether or not specifically stated, it is an element of every offense defined in this article that

the sexual act was committed without the consent of the victim." The very next section of the article, § 61-8B-3, "Sexual assault in the first degree," is the exact section under which the Petitioner was charged above.

Clearly, this essential, fundamental element of "lack of consent" was nowhere to be found in the jury instruction for First Degree Sexual Assault, for which the Petitioner was convicted. The jury was not asked to find, nor did it find, that the Petitioner committed a sexual offense with the "lack of consent" of the victim. The jury instruction does not describe any offense under the laws of this State.

II. Rule

The West Virginia Rules of Criminal Procedure state that:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time, copies of such requests shall be furnished to all parties. The court shall inform counsel of its proposed action upon the requests and disclose to counsel all other instructions it intends to give before the arguments to the jury are begun and the instructions given by the court. The court may instruct the jury before or after the arguments are completed or at both times. The instructions given by the court, whether in the form of a connected charge or otherwise, shall be in writing and shall not comment upon the evidence, except that supplemental written instructions may be given later, after opportunity to object thereto has been accorded to the parties. The court may show the written instructions to the jury and permit the jury to take the written instructions to the jury room. No party may assign as error the giving or the refusal to give an instruction or the giving of any portion of the charge unless that party objects thereto before the arguments to the jury are begun, stating distinctly the matter to which that party objects and the grounds of the objection; **but the court or any appellate court may, in the interest of justice, notice plain error in the giving or refusal to give an instruction, whether or not it has been made the subject of objection.** Opportunity shall be given to make objection to the giving or refusal to give an instruction out of the presence of the jury.

W. Va. R. Crim. P. 30 (emphasis added).

This Honorable Court has extended the statute to a mandatory standard, which holds that:

> The trial court *must* instruct the jury on all essential elements of the offenses charged, and the failure of the trial court to instruct the jury on the essential elements deprives the accused of his fundamental right to a fair trial, and constitutes reversible error.

Syllabus, *State v. Miller*, 184 W. Va. 367, 400 S.E.2d 611 (1990) (emphasis added).

> The plain error doctrine contained in Rule 30 and Rule 52(b) of the West Virginia Rules of Criminal Procedure is identical. It enables this Court to take notice of error, including instructional error occurring during the proceedings, even though such error was not brought to the attention of the trial court. However, the doctrine is to be used sparingly and only in those circumstances where substantial rights are affected, or the truth-finding process is substantially impaired, or a miscarriage of justice would otherwise result.

Syl. Pt. 4, *State v. England*, 180 W.Va. 342, 376 S.E.2d 548 (1988); Syl. Pt. 2, *State v. Rogers*, 215 W. Va. 499, 501, 600 S.E.2d 211, 213 (2004).

III. Application

Because there was no objection to the clearly erroneous instruction at trial, this Court should apply the plain error doctrine in its review of this issue. The interest of justice requires a finding that the circuit court gave a clearly defective instruction that omitted the most crucial element of the offense, which is that the sexual conduct in question was committed without the consent of the victim. The trial court obviously failed to instruct the jury on the

essential element of consent, and "the failure of the trial court to instruct the jury on the essential elements deprives the accused of his fundamental right to a fair trial, and constitutes reversible error." Syllabus, *State v. Miller*, 184 W. Va. 367, 367, 400 S.E.2d 611, 611 (1990).

The jury made never a determination, beyond a reasonable doubt or by any standard, that any sexual contact between the victim and the Petitioner was made without the victim's consent. Effectively, no jury ever found the Petitioner guilty of any cognizable sexual offense under West Virginia law.

This is clearly "(1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." Syllabus Point 7, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995); Syl. Pt. 2, *State ex rel. Morgan v. Trent*, 195 W. Va. 257, 259, 465 S.E.2d 257, 259 (1995).

The Petitioner certainly would not knowingly waive his right to a proper jury instruction with all of the essential elements of the offense that carries a sentence of not less than fifteen nor more than thirty-five years. See W. Va. Code Ann. § 61-8B-3; See Syl. Pt. 8, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995; W. Va. Code Ann. § 61-8B-3). Rather, this was an obvious oversight by the prosecution, the defense attorneys, and the circuit court.

Accordingly, this Honorable Court should apply Rule 30 and Rule 52(b) of the West Virginia Rules of Criminal Procedure, and take "notice of instructional error occurring during the proceedings, even though such error was not brought to the attention of the trial court." Syl. Pt. 4, *State v. England*,

180 W.Va. 342, 376 S.E.2d 548 (1988); Syl. Pt. 2, State v. Rogers, 215 W. Va. 499, 600 S.E.2d 211 (2004). This is a matter of plain error.

IV. Conclusion

Because the circuit court committed reversible error by using a fatally defective jury instruction that omitted an essential element of the offense charged, the Petitioner's conviction and sentence should be reversed.

ERROR #2: The State was permitted to present evidence and a theory of the case based on Felony Murder, but only allowed the jury to make a determination of premeditated First Degree Murder.

I. Issue.

Through the State's indictment and jury instruction (particularly with the charge of First Degree Robbery by killing the victim, Mr. Moses) the State presented a theory of the case which purported to show that the Petitioner committed First Degree Murder by manner of felony murder. *AR* at 2, 374. There was little to no evidence introduced that the Defendant possessed the requisite *mens rea* of malice and premeditation. Accordingly, the state relied on evidence that presumed the Defendant killed Mr. Moses in the commission of a felony.

However, the indictment and jury charge only raised the allegation of Premeditated First Degree Murder. *AR* at 2, 368.. This had the effect of denying the Petitioner of the protections provided by the Double Jeopardy Clause from a finding of Felony Murder by the jury, where lesser included

offenses, such as Robbery or Burglary would be subsumed by the greater offense of the Felony Murder.

This error in the instruction went without objection. As in the previous assignment of error relating to fatally defective jury instruction, this Honorable Court should apply a "plain error" standard of review. See Syl. Pt. 4, State v. England, 180 W.Va. 342, 376 S.E.2d 548 (1988); Syl. Pt. 2, State v. Rogers, 215 W. Va. 499, 600 S.E.2d 211 (2004).

II. Rule.

This Court has held that "[d]ouble jeopardy prohibits an accused charged with felony murder, as defined by W.Va.Code § 61–2–1 (1977 Replacement Vol.), from being separately tried or punished for both murder and the underlying enumerated felony." Syllabus point 8, *State v. Williams*, 172 W.Va. 295, 305 S.E.2d 251 (1983).

This Court has further held that:

> In a prosecution for first-degree murder, the State must submit jury instructions which distinguish between the two categories of first-degree murder—willful, deliberate, and premeditated killing and felony-murder—if, under the facts of the particular case, the jury can find the defendant guilty of either category of first-degree murder. When the State also proceeds against the defendant on the underlying felony, the verdict forms provided to the jury should also reflect the foregoing distinction so that, if a guilty verdict is returned, the theory of the case upon which the jury relied will be apparent.

Syl. Pt. 9, *State v. Giles*, 183 W. Va. 237, 395 S.E.2d 481 (1990).

"The trial court *must* instruct the jury on all essential elements of the offenses charged, and the failure of the trial court to instruct the jury on the

essential elements deprives the accused of his fundamental right to a fair trial, and constitutes reversible error." Syllabus, *State v. Miller*, 184 W. Va. 367 , 400 S.E.2d 611 (1990) (emphasis added).

III. Application.

The jury instruction for Count II, First Degree Murder, used by the trial court charged the jury must find beyond a reasonable doubt that:

1. THE DEFENDANT, BRIAN E. LYON, II
2. IN MARION COUNTY, WEST VIRGINIA,
3. ON OR ABOUT THE 29™ DAY OF SEPTEMBER, 2019,
4. DID WILLFULLY, INTENTIONALLY, DELIBERATELY AND PREMEDITATEDLY WITH MALICE AND INTENT,
5. KILL CHRISTOPHER W. MOSES.

AR at 368.

There was no alternative to find First Degree Murder by Felony Murder. It is particularly egregious that the alternative theory for felony murder was omitted, as the jury charge for Count III, Robbery in the First Degree, read that the jury must find beyond a reasonable doubt that:

1. THE DEFENDANT, BRIAN E. LYON, II,
2. ON THE 29th DAY OF SEPTEMBER, 2019,
3. IN MARION COUNTY, WEST VIRGINIA;
4. DID,
5. COMMIT A ROBBERY,
6. AGAINST CHRISTOPHER W. MOSES,
7. BY STEALING,.TAKING AND CARRYING AWAY THE 2017 DODGE RAM TRUCK, FIREARMS, CELLULAR PHONE AND/OR PERSONAL PROPERTY BELONGING TO CHRISTOPHER W. MOSES AND/OR DAWN SMITH
8. **BY KILLING CHRISTOPHER W. MOSES BY SHOOTING HIM WITH A HANDGUN,**

Id. at 374 (emphasis added).

The very nature of the instruction (mirroring the language of the indictment) describes a robbery committed by means of murdering the victim. There is a clear mandate in West Virginia Law that "the State must submit jury instructions which distinguish between the two categories of first-degree murder—willful, deliberate, and premeditated killing *and felony-murder—if, under the facts of the particular case, the jury can find the defendant guilty of either category of first-degree murder.*" Syl. Pt. 9, *State v. Giles*, 183 W. Va. 237, 395 S.E.2d 481 (1990) (emphasis added).

The State's theory of the case was clear. The State sought to prove that the Petitioner went to the home of Mr. Moses as an invited guest with the intent to rob Mr. Moses. The state then posited, through testimony and argument, that the Petitioner shot and killed Mr. Moses, assaulted his girlfriend, then stole money and Mr. Moses' truck. There were no witnesses or other evidence to show what exactly transpired in the time immediately preceding Mr. Moses' death. Under the facts of the case, it would have been more likely that the jury would have found the Petitioner guilty of felony murder than of premeditated murder. However, the jury was never given the opportunity to make this determination.

This failure to properly instruct the jury was a matter of plain error. It was "(1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial

proceedings." Syllabus Point 7, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995); Syl. Pt. 2, *State ex rel. Morgan v. Trent*, 195 W. Va. 257, 465 S.E.2d 257 (1995).

Had the jury been properly instructed on the alternative theory of felony murder, it would have likely cancelled out one of the other offenses (most likely the robbery) for which the Petitioner was convicted. This is because "[d]ouble jeopardy prohibits an accused charged with felony murder [...] from being separately tried or punished for both murder and the underlying enumerated felony." Syllabus point 8, *State v. Williams*, 172 W.Va. 295, 305 S.E.2d 251 (1983).

The circuit court failed to instruct the jury on the essential elements of Felony Murder, and "[t]he trial court must instruct the jury on all essential elements of the offenses charged, and the failure of the trial court to instruct the jury on the essential elements deprives the accused of his fundamental right to a fair trial, and constitutes reversible error." Syllabus, *State v. Miller*, 184 W. Va. 367, 400 S.E.2d 611 (1990).

Given the unpredictable nature of juries, the negation of one of the other underlying felonies is not the only possible change that could have occurred. There is a good chance that a jury failing to find premeditation or deliberation very well may have entered a verdict with a recommendation of mercy for the murder charge. They may have even found a lesser degree of homicide or found no crime to convict at all.

IV. CONCLUSION

Because the circuit court committed plain error by failing to provide the jury with an instruction on the necessary elements of Felony Murder, the Petitioner's conviction and sentence should be reversed.

Error #3: The Petitioner's conviction should be overturned because the Prosecutor made extremely inappropriate comments to the jury during opening and closing argument, repeatedly referring to the Petitioner as a "Monster' and "Evil."

I. Issue

During the State's opening and closing arguments, the prosecutor made entirely inappropriate and unfairly prejudicial remarks about the Petitioner. The prosecutor referred to him not as a person, but as a "monster" and a manifestation of "evil." In contrast, the prosecutor argued that Dawn Smith surviving her attack from the Petitioner was evidence of an actual "miracle" on Earth.

II. Rule

This Honorable Court has held that:

> The prosecuting attorney occupies a quasi-judicial position in the trial of a criminal case. In keeping with this position, he is required to avoid the role of a partisan, eager to convict, and must deal fairly with the accused as well as the other participants in the trial. It is the prosecutor's duty to set a tone of fairness and impartiality, and while he may and should vigorously pursue the State's case, in so doing he must not abandon the quasi-judicial role with which he is cloaked under the law.

Syl. Pt. 3, State v. Boyd, 160 W.Va. 234, 233 S.E.2d 710 (1977); Syl. Pt. 4, *State v. Hamrick*, 216 W. Va. 477, 607 S.E.2d 806 (2004).

"A judgment of conviction will not be set aside because of improper remarks made by a prosecuting attorney to a jury which do not clearly prejudice the accused or result in manifest injustice. Syl. Pt. 5, *State v. Sugg*, 193 W. Va. 388, , 456 S.E.2d 469 (1995).

"Appellate courts give **strict scrutiny** to cases involving the alleged wrongful injection of race, gender, or religion in criminal cases. Where these issues are wrongfully injected, reversal is usually the result. Where race, gender, or religion is a relevant factor in the case, its admission is not prohibited unless the probative value of the evidence is substantially outweighed by the danger of unfair prejudice." Syl. Pt. 9, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

"Four factors are taken into account in determining whether improper prosecutorial comment is so damaging as to require reversal: (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters." Syl. Pt. 6, *State v. Sugg*, 193 W. Va. 388, 456 S.E.2d 469 (1995).

III. Analysis.

The State's theme throughout the trial was that it would prove that "monsters" and "evil" were real, and that the Petitioner was the living embodiment of this pseudo-religious claim. Throughout the State's entirely inappropriate and prejudicial opening, closing, and rebuttal argument, the Petitioner's trial counsel did not object, so the matter must be reviewed under a plain error standard of review. See Syllabus Point 7, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995); Syl. Pt. 2, *State ex rel. Morgan v. Trent*, 195 W. Va. 257, 465 S.E.2d 257 (1995).

However, as a corollary, the inappropriate use of religious imagery and themes integral to the State's argument requires an analysis of the error under a standard of *strict scrutiny.* See Syl. Pt. 9, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

Within the first three paragraphs of the prosecutor's opening, he referred to Mr. Moses as a "friend to all," and then went on to explain that:

> [s]o now my duty at this stage of the game is to tell you, as the court informed you, what the State's evidence is going to show. And it is my unfortunate duty, ladies and gentleman, to inform you that our evidence will prove to you beyond a reasonable doubt that evil exists in this world. It truly does. *Monsters are real.* They aren't just in books or movies or on Netflix. *Monsters truly exist, and are in this case, embodied right here in human form, Brian Lyon, II. You're going to see that the things that he did to these people truly evil monsters are real.*

Id. at 805-806 (emphasis added).

These remarks were shockingly prejudicial, painting the Petitioner in a supernaturally evil light. Yet, at the same time, the State ascribes a supernatural goodness to Ms. Smith, describing her survival of the attack:

> [h]e forces her into the shower. There was a shower right beside her. It has a glass door. He puts her in the shower and tells her to clean herself in an effort to get rid of any evidence. she pumps the body wash. she starts to scrub. BANG! He shoots her in the back, like the *coward* that he is, while she is in the shower, through the glass door, shattering all of the glass. The bullet went through her back. It hit a rib. It penetrated her lung, and it lodged underneath her aorta where it exists to this very day and cannot be removed. That did not kill.
>
> *Remember, I told you our evidence is going to prove that evil exists, and it also proves that miracles are real.* This woman was filled with the indomitable spirit to survive and to live to take care of her children. she did not die. She falls to the ground in all of the shattered glass. She's cut all over. she's gasping for breath because her lungs are punctured.

Id. at 812-813 (emphasis added).

The prosecutor completed his opening argument by dehumanizing the Petitioner, refusing to even call him a man or a person, stating that:

> [s]o you've been told a lot of things about what your duty is. what your duty is to weigh the evidence, consider the evidence, and consider everything that you hear and see and are presented with, and I trust that after you do that, you'll be left with only one conclusion: *This monster* is guilty of what the State says he is, and I trust that you will return a verdict of guilty on each and every count.

Id. at 820 (emphasis added).

This overarching theme was then extended to the closing argument, as the prosecutor began the closing with:

> You know, ladies and gentlemen, nobody likes the guy who says, I told you so. But it's my sad and unfortunate duty to stand before you today and say to you that I told you so. *I told you that we would prove that evil exists in this world, that monsters exist in this world, and that it exists in the shape and form of this monster seated right before your very eyes. Study it.* Look him in the eyes. Take careful note of his face. This is the man who did every horrible thing that you heard about over the last five days from this witness stand. No question.

Id. at 1547 (emphasis added).

He went on to misconstrue the jury instruction on murder with "malice" and "evil intent" from a measure of *mens rea* at the time of the offense to an overall description of the Petitioner's entire essence, saying that;

> when the judge gave you instructions, and he talked about malice and a mind bent on evil intent regardless of social duty and evil. *Right here it is. (Pointing to the defendant) Right here in the same room with all of us.*

Id. at 1551 (emphasis added).

Returning to his ongoing insult of degrading the Petitioner as a coward[7] (as well as invoking God[8]), he stated that:

> In an effort to cover up what he did, he forces her at gunpoint upstairs to shower, and I had her talk to you and tell you what was going through her mind, please, God, don't let me die. I have daughters to take care of. Just imagine when you get to that mercy point what mercy did he show her? He showed her nothing other than evil and malice, and hate. He tried to kill her like the *coward* he is to cover up this awful deeds.

Id. at 1558.

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[7] During opening and closing, the prosecutor called the Petitioner a coward seven times. *AR* at 811, 813, 819, 1552, 1554, 1558, 1561,

[8] References to Dawn Smith praying to "God" was invoked twice in the State's opening, closing, and rebuttal. *AR 1558.* The prosecutor also thanked God for allowing law enforcement to find the Petitioner's DNA in the bathroom. *AR* at 1556.

Finally, in the State's rebuttal, the jury was offered a leading part in the redemption arc of the prosecutor's passion play. They were told that:

> I say it's time we close the book on *the monster that is Brian Lyon.* We can put the book away for all eternity where it belongs so that nobody else has to read one chapter. There is an epilogue, there is an epilogue to this story. *You, ladies and gentlemen, have the duty to complete this. It's a heavy burden that you carry, but you can leave the doors of this courtroom today with your head held high and proud of what you did and proud of your decision and glad for what you have done to bring goodness and light in this world to close the book on evil.* You could do that, and there are lessons, there's morals to this story. There are things we could take away from this that make us happy and gleeful, instead of sad and depressed.
> [...]
> You know, you can leave here today with hope, with joy, and with satisfaction of a job well done. There is goodness in this world, and goodness is what defeats evil. And what's good and what's right and what's just is what must be done in this case, so you find him guilty of every single charge with which we charged him with, and you do so today in your deliberations, and I trust that you will do that. Thank you so very much for your time.

Id. at 1590-1591 (emphasis added). Language used here is suspiciously close to the King James version of Matthew 5:16, which says, "Let your light shine before men, that they may see your good works, and glorify your Father which is in heaven." Matthew 5:16, KJV.

Jurors selected to be objective finders of fact were being enlisted in a holy war that pitted good against evil, with the Petitioner placed squarely on the side of latter. The prosecutor's argument inherently inserted the jury into a crusade to purge "evil" and "monsters" from Marion County, and called upon them by act of faith to bear witness the prosecutor's "miracle." See *AR* at 813. Like the feeling of a cleansed soul after taking communion, they could leave feeling good about what they had done if they just took the rite and put the Petitioner in prison for life.

Though no specific religion was explicitly invoked, the spiritual throughline of the argument is readily apparent To constantly invoke descriptions of "evil" being overcome by "miracles" is to clearly inject an overriding Judeo-Christian religious theme to the proceedings. This Honorable Court "give[s] strict scrutiny to cases involving the alleged wrongful injection of race, gender, or religion in criminal cases[,] [and w]here these issues are wrongfully injected, reversal is usually the result. Syl. Pt. 9, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

This characterization made by the State denied the Petitioner any semblance of personhood in the eyes of the jury, and reframed him as an inhuman "monster," a beast, a creature to be judged as an "it" rather than a "he." See *AR* at 1547.

This is startlingly apparent when the prosecutor states in closing, "I told you that we would prove that evil exists in this world, that monsters exist in this world, and that it exists in the shape and form of this monster seated right before your very eyes. **Study it**." *Id.* at 1547. Whether the prosecutor was cognizant of the racial dynamics or not, there is something especially troubling in referring to a defendant as "it" in a courtroom where all of the lawyers, the judge, the clerk, and the court reporter are white, and the defendant is a black man.

As none of this argument was objected to by the Petitioner's trial counsel, the plain error rule must apply. *See above.*

It is obvious that the prosecutor abandoned his "quasi-judicial" role, and adopted the "'role of a partisan, eager to convict," Syl. Pt. 3, *State v. Boyd*, 160 W.Va. 234, 233 S.E.2d 710 (1977); Syl. Pt. 4, *State v. Hamrick*, 216 W. Va. 477, 478, 607 S.E.2d 806, 807 (2004). "It is the prosecutor's duty to set a tone of fairness and impartiality, and while he may and should vigorously pursue the State's case, in so doing he must not abandon the quasi-judicial role with which he is cloaked under the law." *Id.* Yet, the State's principal argument, through opening and closing, did the exact opposite. With the prosecutor's invocation of supernatural elements, such as monsters, miracles, and evil incarnate, the quasi-judicial role was replaced with a role of quasi-priesthood.

"A judgment of conviction will not be set aside because of improper remarks made by a prosecuting attorney to a jury which do not clearly prejudice the accused or result in manifest injustice. Syl. Pt. 5, *State v. Sugg*, 193 W. Va. 388, 456 S.E.2d 469 (1995). In this matter, the result is a clear example of manifest injustice. Regardless of the weight of any evidence in this matter, it is manifestly unjust for a defendant to be so utterly dehumanized by the prosecution and be equated, as an individual, with the living incarnation of pure "evil." *AR* at 1547. Such an argument replaces the dispassionate logic of trial court with the raw emotions of a tent revival.

"Four factors are taken into account in determining whether improper prosecutorial comment is so damaging as to require reversal: (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3)

absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters." Syl. Pt. 6, *State v. Sugg*, 193 W. Va. 388, , 456 S.E.2d 469 (1995).

For the first factor, the remarks have an overwhelming tendency to mislead the jury and prejudice the accused. The State's argument was unabashedly based on a recurring motif that the Petitioner's character was that of a subhuman monster and a supernatural evil. The jury was asked less to determine whether the Petitioner was guilty of the acts outlined in the indictment, and more to choose a side in a universal battle of light and dark. They were promised a cleansed soul in exchange for a conviction, told that "you can leave here today with hope, with joy, and with satisfaction of a job well done. There is goodness in this world, and goodness is what defeats evil. And what's good and what's right and what's just is what must be done in this case, so you find him guilty of every single charge with which we charged him with." *Id.* at 1590-1591. Obviously, the State's pitch mislead the jury by asking them to rely on their faith based assumptions of goodness versus evil over objective logic in coming to a verdict.

The second factor asks whether the remarks were isolated or extensive. The remarks were extensive. The prosecutor invoked the term "monster" ***twenty-two*** times during opening, closing, and rebuttal when talking about the Petitioner. See *AR* at 805, 806, 814, 820, 1547, 1548, 1549, 1550, 1555, 1557, 1560, 1563, 1590, 1591.

Time and time again, from the beginning of opening argument, through the closing, and finally throughout the rebuttal, the Petitioner was described as an evil monster, and the question of the jury's verdict was time after time posed as a choice between good and evil (or between God and the Devil).

For the third factor, it must be considered, absent the remarks, what was the strength of competent proof introduced to establish the guilt of the accused? While this is a matter for debate, the Petitioner feels there is a strong argument to the contrary. See *Error #4*, infra. Moreover, this being a case of First Degree Murder, the jury is required to make a determination on more than just guilt. Unique to a First Degree Murder Conviction, a West Virginia Jury must also determine the punishment. Whether or not the Petitioner deserves any form of mercy in the matter is also up to the jury. W. Va. Code Ann. § 62-3-15.[9] So even if this Honorable Court cannot be convinced that the prosecutor's inappropriate statements effected the jury's finding of guilt, there is a high likelihood the jury's decision to convict without mercy may have been altered by the comments.

The final factor is whether the comments were deliberately placed before the jury to divert attention to extraneous matters. Again, the State's entire

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[9] "If the person indicted for murder is found by the jury guilty thereof, and if the jury find in their verdict that he or she is guilty of murder of the first degree, or if a person indicted for murder pleads guilty of murder of the first degree, he or she shall be punished by imprisonment in the penitentiary for life, and he or she, notwithstanding the provisions of article twelve, chapter sixty-two of this code, shall not be eligible for parole: Provided, That the jury may, in their discretion, recommend mercy, and if such recommendation is added to their verdict, such person shall be eligible for parole in accordance with the provisions of said article twelve, except that, notwithstanding any other provision of this code to the contrary, such person shall not be eligible for parole until he or she has served fifteen years[.]" W. Va. Code Ann. § 62-3-15.

theme of the case through opening, closing, and rebuttal was deliberately designed to focus the jury's attention to matters relating to the Petitioner's character rather than the straightforward facts before the jury. While the State outlined the facts of the case, those facts took a back seat to a performance of spiritual warfare.

Because this issue requires a plain error analysis, this Honorable Court must also consider whether permitting this commentary from the State during all stages of the argument was "(1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." Syllabus Point 7, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995); Syl. Pt. 2, *State ex rel. Morgan v. Trent*, 195 W. Va. 257, 259, 465 S.E.2d 257, 259 (1995). Allowing that argument to proceed was plainly an error that affected the substantial rights of the Petitioner to have his case heard fairly in front of a jury of his peers. Most crucially, allowing such an egregiously biased, unfair, and prejudicial line of argument by the State to both open and close the Petitioner's trial "seriously affects the fairness, integrity, or public reputation of the judicial proceedings." *Id.*

Obviously, this Honorable Court has adopted a "strict scrutiny" standard of review for "cases involving the alleged wrongful injection of race, gender, or religion in criminal cases[]" for a reason. See *Guthrie,* supra. Allowing the improper use of such prejudicial, faith-based tactics undermines the fairness, integrity, and fairness of the judicial process.

IV. Conclusion.

Because the State's opening, closing, and rebuttal argument to the jury were clearly improper and prejudicial to the Petitioner, this should result in a reversal of the Petitioner's convictions on all counts.

Error #4: There was insufficient evidence presented at trial to sustain convictions to convict on Premeditated First Degree Murder, Burglary, and First Degree Robbery of Mr. Moses.

a. First Degree Robbery.

There was insufficient evidence to prove the Petitioner guilty of the First Degree Robbery of Mr. Moses, as charged in the indictment and jury instruction. *AR* at 4, 374. The jury instruction charges that the Petitioner committed the offense "BY KILLING CHRISTOPHER W. MOSES BY SHOOTING HIM WITH A HANDGUN." *AR* at 374. This instruction presupposes intent, in that it assumes that the Petitioner chose to shoot and kill Mr. Moses specifically for the purpose of taking his personal property. As explained above, there was no evidence presented at trial to establish what might have occurred between Mr. Moses and the Petitioner shortly before Mr. Moses's death. As such, even assuming, *arguendo*, that the Petitioner did shoot and kill Mr. Moses, there is no evidence to establish that Mr. Moses did so with that specific motive or intent.

b. Burglary.

The jury instruction for Burglary charged that:

1. DEFENDANT, BRIAN E. LYON, II;
2. IN MARION COUNTY, WEST VIRGINIA;
3. ON OR ABOUT THE 29TH DAY OF SEPTEMBER, 2019;
4. ENTERED WITHOUT BREAKING IN THE NIGHT;
5. A DWELLING HOUSE;
6. BELONGING TO CHRISTOPHER W. MOSES;
7. WITH THE INTENT TO COMMIT A CRIME, THEREIN.

AR at 366.

Assuming, *arguendo*, that the Defendant was in the home of Mr. Moses on or about September 29, 2019, the only testimony provided at trial as to how the Petitioner came to be in the home was from Dawn Smith. She testified that she found the Petitioner asleep on the couch in the early morning hours, and when she asked Mr. Moses about the stranger on the couch, Mr. Moses stated that the Petitioner was an invited guest in the home. *AR* at 1469-1470. It is true that "the essential requirement of burglary committed in the nighttime is that the defendant 'enter ... with intent to commit a felony or any larceny[,]' [and t]he intent and the acts of the defendant are controlling, and the consent of the occupant to enter is not a defense when the defendant is shown to have entered through fraud or threat of force with the requisite criminal intent." *State v. Slater*, 222 W. Va. 499, 504, 665 S.E.2d 674, 679 (2008).

There is absolutely no tangible evidence that, at the time the Petitioner would have entered the home of Mr. Moses, the Petitioner would have had an intent to commit a crime therein. The testimony of Ms. Smith that she initially found the Petitioner asleep on the couch goes directly against any theory of the case that the Petitioner's entry into the home was through fraud or threat of force. *AR* at 1469-1470. It would implicate that the Petitioner came into the

case that the Petitioner's entry into the home was through fraud or threat of force. *AR* at 1469-1470. It would implicate that the Petitioner came into the home with intent to fall asleep. Even if one were to believe the Petitioner committed the homicide or other alleged offenses in the home, the intent for those crimes would have to have been created hours after the Petitioner's lawful entry.

c. Premeditated First Degree Murder.

There was insufficient evidence to convict the Petitioner of the First Degree Murder of Mr. Moses. This was addressed by trial Counsel in the Rule 29 Motion presented at the close of the State's case. *AR* at 1508 to 1509.

The Petitioner's trial counsel argued that:

> ... I would simply respond by saying first of all that Ms. Smith did not identify the defendant as the person who killed Christopher Moses, and there was no such testimony. There is certainly no eyewitness testimony of anyone who stated that the defendant was the person who killed Christopher Moses. There was certainly nothing presented at any point in time that establishes premeditation with the killing of Christopher Moses. There's nothing to show that Mr. Lyon was present in the home with the intent to commit any crimes and no firearm recovered. we have testimony from the firearm examiner from the State Police who says it could be any number of weapons that handled -- which cycled or fired the bullets and the casings in this case.
>
> Again, I don't think it's as clear cut as what the State makes it out to be in response to the defendant's motion, and again I would submit that they failed to meet their burden particularly, most particularly the first-degree murder charge as they have not established anything that would lend itself to premeditation.

Id.

another while Mr. Moses was alive was testimony from Dawn Nicole Smith, wherein she stated that she saw the Petitioner asleep on the couch in the early morning hours before Mr. Moses's death. *AR* at 1469-1470. She further testified that at roughly the same time she found Mr. Moses heavily intoxicated in the garage, where Mr. Moses told her that the Petitioner was an invited guest in the home. *Id.*

There was no evidence presented by anyone who witnessed the time directly before, during, or after Mr. Moses's death. There were no witnesses who could put on direct testimony of the Petitioner being in the same room or having any social interaction of Mr. Moses. The State merely presented hearsay testimony from Mr. Elliot, who stated that the two were together at a party he was hosting until at least 4:00 a.m. *AR* at 1078. However, according to police allegations, Mr. Elliot is a federal parolee, and he refused to be recorded in his police interview or participate in the prosecution of the Petitioner. *Id.* at 464.[10]

Even assuming, arguendo, that Mr. Moses's death was somehow caused by the Petitioner, there is no evidence whatsoever to establish what transpired between the two before Mr. Moses died. There is certainly no basis to assume premeditation or malice, or even that the killing was unlawful, rather than as a result of self-defense.

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[10] Because the Petitioner's trial lawyers failed to object to this testimony, the Petitioner does not believe it appropriate raise this hearsay error in direct appeal. Depending on the outcome of this matter, the failure to object to this inadmissible evidence is likely to be an issue of ineffective assistance of counsel on a future habeas corpus proceeding.

There is a tenuous link between the Petitioner and Mr. Moses' actual death. The firearm used to kill Mr. Moses was never recovered. *Id.* at 1508-1509. There was no definitive forensic evidence linking the Petitioner to the shooting of Mr. Moses or Ms. Smith.

CONCLUSION

For the reasons detailed above, this Honorable Court should reverse the Petitioner's convictions on all counts and remand the matter back to the Circuit Court of Marion County.

Respectfully Submitted,
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IN THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

CASE NO. 22-0042

STATE OF WEST VIRGINIA
Plaintiff Below, Respondent,

v. **Appeal from a final order of the Circuit Court of Marion County (20-F-145)**

BRIAN LYON
Defendant Below, Petitioner.

Certificate of Service

I, M. Tyler Mason, attorney for the Petitioner, do hereby state that true and accurate copies of this Appellate Brief and its corresponding Appendix have been served on the following parties, by First Class U.S. mail, this **18th** day of **May 2022**:

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